This order is SIGNED.

Dated: December 20, 2017

William T. Thurman

WILLIAM T. THURMAN
U.S. Bankruptcy Judge

Prepared and Submitted by:

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re: CS MINING, LLC, Debtor.	Bankruptcy Case No. 16-24818-WTT Chapter 11 Honorable William T. Thurman
MATTHEW CHENAULT on behalf of himself and all others similarly situated, Plaintiff, v. CS MINING, LLC, Defendant.	Adversary Case No. 16-2095

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT AND DENYING CS MINING, LLC'S EXPEDITED MOTION FOR RELIEF UNDER FED. R. CIV. P. 56(D)

On November 30, 2017, a hearing was held on Plaintiff's Motion to Strike Affirmative Defenses Or, in the Alternative, for Partial Summary Judgment and CS Mining, LLC's Expedited Motion for Relief Under Fed. R. Civ. P. 56(d). At the hearing Plaintiff Matthew Chenault and the certified class were represented by René Roupinian of Outten & Golden, LLP and Defendant CS Mining, LLC was represented by Joanna Cline of Pepper Hamilton, LLP and Jeff Tuttle of Snell & Wilmer, LLP.

The Court heard and carefully considered the arguments of counsel at the hearing and in the memoranda filed with the Court including CS Mining, LLC's argument that verbal notice may be as much notice as practicable under 29 U.S.C. § 2102(b)(3) and therefore may be sufficient notice to allow an employer to rely on the unforeseeable business circumstances defense set forth in 29 U.S.C. § 2102(b)(2)(A) and/or the faltering company defense set forth in 29 U.S.C. § 2102(b)(1). For the reasons stated by the Court on the record at the conclusion of the hearing, the transcript of which is attached hereto, the Court finds that Plaintiff's Motion is well-taken and should be granted and that additional discovery on the issues presented by Plaintiff's Motion is not necessary.

Accordingly,

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion to Strike Affirmative Defenses Or, in the Alternative, for Partial Summary Judgment is GRANTED.

2. Defendant's Third and Fourth Affirmative Defenses, the unforeseeable business circumstances defense pursuant to 29 U.S.C. § 2102(b)(2)(A) and the faltering company defense pursuant to 29 U.S.C. § 2102(b)(1), set forth in its *Answer and Affirmative Defenses of*

Defendant CS Mining LLC to Class Action Adversary Complaint, filed August 23, 2016 (Doc. 14), are STRICKEN.

3. Defendant's Expedited Motion for Relief Under Fed. R. Civ. P. 56(d) is DENIED.

END OF ORDER

DESIGNATION OF PARTIES TO BE SERVED

Service of the foregoing order shall be served to the following parties in the manner designated below:

By Electronic Service (CM/ECF) – I certify that the parties of record in this case as identified below, are registered CM/ECF users and will be served notice of the foregoing Order through the CM/ECF system:

- David E. Leta dleta@swlaw.com; wkalawaia@swlaw.com; csmart@swlaw.com
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By U.S. Mail Service – In addition to the parties of record receiving notice through the CM/ECF system, the following parties should be served notice pursuant to Fed. R. Civ. P. 5(b):

Douglas Herrmann
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Hercules Plaza, Suite 5100
Wilmington, DE 19899-1709

/s/ René S. Roupinian
René S. Roupinian

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of December, 2017, I caused a copy of the foregoing proposed **ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND DENYING CS MINING, LLC'S EXPEDITED MOTION FOR RELIEF UNDER FED. R. CIV. P. 56(D)** to be filed electronically via the Court's ECF system. Notice of this filing will be sent to all parties registered to receive filings in this case by operation of the Court's ECF system. Parties may access this filing through the Court's ECF system. Additionally, any parties that have appeared and will not be served electrically via the Court's ECF system have been served a copy of the foregoing via U.S. Mail, postage prepaid.

/s/ René S. Roupinian
René S. Roupinian

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
CS MINING, LLC,	)	Bk. Case No. 16-24818WTT
	)	
Debtor,	)	
	)	
MATTHEW CHENAULT on behalf of himself and all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. Case No. 16-022095WTT
	)	
CS MINING, LLC.,	)	
	)	
Defendant.	)	

Transcript of Electronically-Recorded Court's
Ruling on Motion for Summary Judgment

BEFORE THE HONORABLE WILLIAM T. THURMAN

November 30, 2017

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Salt Lake City, Utah, Thursday, November 30, 2017

* * *

THE COURT: (Recording begins) case and go over the case law. I've taken a break here to look at some additional case law the parties have cited. I've read it before, I just wanted to read it again.

Appearances were noted on the record. The court is now prepared to rule, and this is the ruling of the court that I'm going to give, which will -- may be memorialized by a written order I'll ask the parties to prepare at the end.

The court finds it has proper jurisdiction over this matter pursuant to 28 USC 1331 and 1334, 29 USC 2104(a)(5). This is a court proceeding under 157(b)(2)(A) of Title 28, (B)(A)(A) -- or 157(b)(2)(A)(B) and (O). Venue is appropriately laid in this district under 28 USC 1409 and 29 USC 2104(a)(5). And I find notice for today's hearing, hearings because there were a couple of matters, to be proper and adequate in all respects.

The main case 16-24818 was filed by an involuntary petition initiated back in June, June 2 of 2016. On June 7 of 2016 plaintiff filed a class action complaint against the defendant in this court on behalf of Matthew Chenault and the certified class. On

August 23, 2016, the defendant filed an answer to the complaint. In the complaint the plaintiff seeks damages in the amount of 60 days' pay and ERISA benefits due to the defendant's alleged violation of the Workers Adjustment and Retraining Notification Act. I'll commonly refer to that as the WARN Act, W-A-R-N, the first initials of the law.

Plaintiff, Mr. Chenault, worked as a control room operator. And I take this from the undisputed facts that are in the papers. So that really wasn't brought up today, but it's undisputed. He worked as a control room operator for the defendant at its facility down in Milford, Utah, until his termination on or about May 17 of 2016, several weeks before the date of the involuntary petition. Defendant's principal place of business is located down in Milford also, but probably in the town.

Until their terminations plaintiff and the class members were employees of defendant who worked at, received assignments from, and reported at the two facilities. The defendant has records containing information about the wages and benefits received by the plaintiff and class members.

In response to the complaint, the defendant asserted various defenses, including two affirmative

defenses which are at issue here today, that unforeseeable business circumstances prevented it from giving 60 days written notice to the plaintiff, or -- yes, 60 days notice to the plaintiff and the putative class members, which is the third affirmative defense; that it was a faltering company, that's the fourth affirmative defense; and that it acted in good faith, that's the sixth affirmative defense. The other defenses are nonstatutory affirmative defenses and are not applicable here in this motion here today.

On May 5, 2017, the court certified the class and appointed plaintiff a class representative. There are approximately 134 members of the class.

The standard for a motion to strike, which is first and foremost on the plaintiff's motion, is Rule 12(f) of the Federal Rules of Civil Procedure. It states that a court may strike from a pleading an insufficient defense, and the court may act on its own or on motion made by a party. Well, I've never acted on my own to strike a defense. I wonder how that would work, but that's an appealable issue I believe. But it's teed up by the parties here today.

A defense is insufficient if it cannot succeed as a matter of law under any circumstances. And that's a quote from my -- our colleague, Judge Daniel, a

district court judge out of Colorado, in the *Purzel Video GmbH* case, 2014, which I find's good law.

The court must be convinced that there are no questions of fact, that any questions of law are clear and not in dispute and that under no circumstances could the defenses succeed. That's a quote from another district court case in -- from a district judge from New Mexico, the *Lane v. Page* case. While motions to strike are generally disfavored, the discretion to grant a motion to strike is within the discretion of the court. That's another quote from *Page*.

The standard for a motion for summary judgment the parties understand, but I like to lay that standard out in any rulings I make plus give a recitation of the facts, which I've done. In our Tenth Circuit, *Becker v. Bateman* case, the circuits have stated, Summary judgment is appropriate when the movant shows there's no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law. Well, that's no revelation. That's right out of the Rule 56(a).

An issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. That's a quote from the *Wal-Mart* case, also from our circuit.

An issue of fact is material if under substantive law it is substantial to an improper disposition of the claim. Put differently, the question is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. These are all Tenth Circuit cases. I'm giving you cites to -- you know what they are. That last one was *Shero v. City of Grove*.

The other case I like is the Supreme Court case, the *Matsushita* case. On summary judgment the inferences to be drawn from the underlying facts must be reviewed in the light most favorable to the party opposing the motion.

While using that standard, I've analyzed the facts. There really are no undisputed facts here. The question before the court is really did the plaintiff give -- or was it -- no, not that it didn't -- the defendant give written notice, was the defendant excused from giving a written notice under the WARN Act for various defenses.

Now, plaintiff may also seek partial summary judgment to strike the affirmative defense, which is being done here today. The WARN Act is a remedial statute. This -- I'm taking that from the *Allen v.*

Sybase case from Judge Stephanie Seymour. You may not have had the pleasure of visiting her or meeting Stephanie Seymour. She's one of the best circuit judges in the country, and I like what she says. It is a remedial statute that generally provides protection to workers, their families, their communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternate jobs and, if necessary, to enter skill training or pretraining that will allow these workers to successfully compete in the job market. It's a broad statement. Everybody agrees to that. Judge Seymour did not go on to say anything about written notice, however.

Now, the WARN Act directs that employers can be liable up to 60 days for backpay and benefits to certain employees who lose their job as part of a plant closing or mass layoffs without receiving the 60 days advance notice. An employer may be excused from the 60-day notice requirement where a mass layoff was the result of an unforeseen business circumstance. Another quote from Judge Seymour.

An employer relying on an excuse under

Section 2102(b), that's a reduction of the notification period of a section of the WARN Act, shall -- quote, "shall give as much notice as is practicable and at that time shall give a brief statement on the basis -- of the basis for reducing the notification period," end quote. And that is citing Section 2102(b)(3) of the Act.

Well, as a preliminary matter the court finds there is no dispute regarding the written notice requirement under the WARN Act. The debtor did not give the affected employees written notice 60 days before their termination, or written notice after their termination. The issue for this court, therefore, is straightforward, may a defendant -- may the defendant rely on the faltering company or on the foreseeable circumstances affirmative defenses without giving any written notice of termination of employment.

As mentioned, the WARN Act contains certain exceptions to the 60-day notice requirement. In this case the applicable exceptions to the 60-day notice requirement are the unforeseen business circumstances exception and the faltering company exception. Importantly, the exceptions do not obviate the need for a written notice once an affected employee has been terminated without the required 60-day written notice. Congress made clear and the overwhelming caselaw cited

by the plaintiffs -- plaintiff, which the court has reviewed, support the fact that when an employer relies on one of the exceptions, it is still required to give, quote, as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period. Well, that is a quote from Judge Seymour in the *Sybase* case -- or *Sybase*.

But the defendant relies on the *Richards* case. The parties have gone back and forth on that. That's a district court case out of the Eastern District of Michigan, Judge McIvor, to support its argument that the required -- requirement outlined in 2102(b)(3) is superfluous. The court is not persuaded by the reasoning in *Richards*. Eliminating the written notice requirement altogether would indeed leave the WARN Act toothless. Moreover, the holding in *Richards* was rejected by the *Dewey* court, which the parties have referred to, issued by Judge Glenn in 2014, which the court finds persuasive. The court stated, quote, "Eliminating the written notice requirement altogether contradicts the WARN Act regulations and existing caselaw in this district," end quote. That was from New York. Required -- requires shortened WARN notice to be written and to contain a brief statement appears to WARN Act legislative scheme. That's another quote from Judge

Glenn.

Dewey goes on to state regulations 639.7 -- this is where it gets really precise and complicated, but Judge Glenn took it apart. He says, quote, Regulation 639.7 requires WARN notice to be written in language understandable to the employees. CFR 639.7 he refers to. Moreover 639.9 provides that shortened notice may be given after the fact, so that the court finds no basis to conclude that an employer can disregard the written notice requirement altogether.

As explained in the Third Circuit case issued earlier this year, which is the *AE Liquidation, Inc.* case -- I don't know if you've got that, but I'll give you the cite here in a second -- the Third Circuit stated, Even if the exceptions in 29 USC 2102(b)(1) and (b)(2)(a) apply, an employer is not relieved of the obligation to notify employees. That's at 866 F.3d 515. Going on, the court states, Even if an employer establishes that unforeseen events prevented it from giving notice 60 days in advance, the Act still requires that an employee give as much notice as is practicable under the circumstances. 2102(b)(3) requires the same including, where appropriate, notice after the fact. And relies on the *Sides v. Macon* case. I think the court -- the parties referred to the *Macon* case earlier

from the Eleventh Circuit where that case -- Judge Wilson writing for the circuit stated that after-the-fact-notice and a brief statement on the basis of reducing notice is required for an employer avoiding certain defenses under the WARN Act.

The court understands the dire circumstances that may have escalated that prevented CS Mining from providing 60 days notice. There may have -- these may have related to unforeseeable business circumstances and a faltering company. However, in the absence of required shortened written notice as soon as practicable that the circumstances giving rise to the exceptions arose or after the termination of the affected employees, defendant cannot invoke the affirmative defense to avoid liability, the affirmative defenses. Thus the motion to strike and the partial motion for summary judgment should be granted.

I'm relying on the reasoning in the *Grimmer v. Lord Day & Lord* case from the Southern District of New York in 1996, where he stated -- the court stated, Granting summary judgment for the plaintiff as employer who's not entitled to a reliable defense due to insufficient written notice. And again rely on the *Dewey* case granting partial summary judgment striking the unforeseeable business circumstances defense due to

insufficient written notice.

Finally, in conclusion, since required notice was never given to the affected employees herein, the motion for summary judgment -- or the motion on the pleadings striking the third and fourth affirmative defenses is granted.

The defendant's Rule 56(d) motion is denied as further discovery is unnecessary to rule on this motion.

The good faith mitigation of damages defense remains, as well as the other nonstatutory defenses which are referred to in the answer. CS Mining remains entitled to attempt to prove that these actions were taken in good faith and that any liability or penalty imposed on it should be reduced. So all I'm doing is very narrowly tossing out those two affirmative defenses.

I'm going to ask counsel for the movant to prepare an order memorializing this. You may refer in the order that the court made its findings and conclusions on the record, and based upon that, the following is ordered, blah, blah, striking and denied as written -- as stated. Thank you very much for your participation today. The court is in recess.

(Whereupon, the matter was concluded.)

C E R T I F I C A T E

State of Utah

County of Salt Lake

I, Karen Murakami, a Certified Shorthand Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken by me from an electronic recording, to the best of my ability to hear and understand said recording, at the time and place set forth herein, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of December, 2017.

Karen Murakami

Karen Murakami, CSR, RPR